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No. 86-1217

In the Supreme Court of the United States

OCTOBER TERM, 1986

JOSEPH P. RUSSONIELLO, ET AL., PETITIONERS

v.

JOSE J. OLAGUES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONERS

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In our petition, we asked the Court to decide: (1) whether, in general, a federal district court has the authority to entertain a pre-indictment challenge to the manner and scope of a criminal investigation by the Executive Branch, apart from any subpoenas, searches, seizures, or other coercive acts that are issued or undertaken during the investigation; and, (2) assuming a federal court has such authority, whether it is nonetheless barred from enjoining or declaring an investigation unconstitutional where it

is undisputed that government officials have a legitimate investigative purpose and have not violated any clearly established constitutional rights. Respondents' arguments in opposition to certiorari review of these questions are unfounded.

1. Respondents first contend (Br. in Opp. 6-12) that the government's petition is "premature" and "inappropriate for plenary review." Such an assertion is ironic in the context of this case, given our contention that the lawsuit itself is premature and therefore nonjusticiable.

There is, of course, no question that the Court has jurisdiction to entertain this petition. See 28 U.S.C. 1254(1). And where the very pursuit of the litigation is the wrong to which the government is objecting, it is wholly appropriate for the Court to grant the petition. See, *e.g.*, *Allen* v. *Wright*, 468 U.S. 737 (1984). The Court has so indicated in cases where it has found that a substantial question exists concerning the propriety of allowing litigation to continue against the United States or its agents. See *Mitchell* v. *Forsyth*, 472 U.S. 511, 524-530 (1985); *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685 n.3 (1949); *Land* v. *Dollar*, 330 U.S. 731, 734 n.2 (1947).

Here, the government submits that it is inappropriate, and highly disruptive, to allow respondents to seek judicial supervision of criminal investigations by the Executive Branch.[1] We do not dispute that

[1] Respondents imply (Br. in Opp. 5-6, 8, 13) that the petition improperly raises a new argument concerning the district court's jurisdiction to adjudicate their claims. As respondents elsewhere concede (Br. in Opp. 6), however, petitioners argued in both courts below that "a federal court has no subject matter jurisdiction to enjoin a prosecutorial inves-

prosecutors or law enforcement officers, like any other officers of government, may be challenged in court when they take actions having a direct and coercive impact on an individual or group of individuals—as, for example, when they issue a subpoena for testimony or records, or when they execute a search warrant. But when the Executive Branch "does not exercise its *coercive* power over an individual's liberty or property rights," it "does not infringe upon areas that courts often are called upon to protect." *Heckler* v. *Chaney*, 470 U.S. 821, 832 (1985) (emphasis in original). Respondents in this case object not to any such coercive requirement or limitation on their actions, but simply to the idea that the government's investigative machinery has focused on activities in which they may be involved. For the courts to entertain such complaints would not only fly in the face of precedent, but would create a major new avenue for harassing litigation and the diversion of prosecutorial efforts.

Respondents cannot properly justify this unwarranted interference with the noncoercive actions of the Executive Branch merely by claiming (Br. in Opp. 10, 13-18) that these investigative activities have chilled the exercise of their constitutional and statutory rights. Even assuming arguendo that respondents feel "intimidat[ed]" by these investigative activities, that members of the organizational re-

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tigation * * *." The articulation and elaboration of that argument in the petition is well within the limits of propriety. Under the rules of this Court, parties "are not confined * * * to the same arguments which were advanced in the courts below upon a Federal question there discussed" (*Dewey* v. *Des Moines*, 173 U.S. 193, 198 (1899)). See generally R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 164-165 (6th ed. 1986).

spondents have been "discouraged" from "participating in the voter registration drive for fear of being swept up in this criminal investigation," and that Hispanic and Chinese-American citizens have been "discouraged" from registering to vote, it nevertheless remains true that such investigative activities are nonjusticiable. The price of providing an individual with a judicial forum to remedy the burdens that result from the mere focusing of investigative attention, according to this Court, is too high to pay. See *FTC* v. *Standard Oil Co.*, 449 U.S. 232, 244 (1980); *Laird* v. *Tatum*, 408 U.S. 1, 10-15 (1972).

Nor can such premature judicial intervention be justified by the allegation that the investigation has focused, among other things, on the national origin of voter registrants. This Court has long recognized that law enforcement officials may and, indeed, often must consider the national origin or race of suspects and witnesses in conducting criminal investigations. See *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 886-887 (1975); *Wygant* v. *Jackson Board of Education*, No. 84-1340 (May 19, 1986) (Stevens, J., dissenting). Thus, just as it has held that Article III requires First Amendment claimants to allege that the government has exercised its *coercive* powers in a manner that adversely affects their free speech or association rights (see *Laird* v. *Tatum*, 408 U.S. at 10-15), so has the Court held that equal protection claimants must allege that government has exercised its *coercive* powers in a discriminatory manner before the jurisdiction of a federal court may be invoked. See *Allen* v. *Wright*, 468 U.S. 737, 753-756 (1984); cf. *Wayte* v. *United States*, 470 U.S. 598, 607-608 (1985) (selective prosecution claim may be raised after indictment has been filed). Respondents have made no such allegations here.

Respondents' claim that the petition is premature is not strengthened by their argument that intervening state law developments arguably may have changed the information concerning voter registrants available to law enforcement officials.[2] Such changes in state law cannot alter the nonjusticiability of the underlying controversy nor, assuming that jurisdiction exists, can they alter the government's entitlement to summary judgment (as granted by the district court), where the undisputed evidence shows that petitioners' investigation had a legitimate purpose and did not violate any clearly established rights.

2. Respondents also err (Br. in Opp. 18-22) in answering our second point—that, even if a challenge to non-coercive investigative actions is justiciable, equitable principles bar the granting of injunctive or declaratory relief against the government,[3] except in extraordinary circumstances not present here. See *Younger* v. *Harris*, 401 U.S. 37, 43-44 (1971); *Kugler* v. *Helfant*, 421 U.S. 117, 123 (1975). While that principle has been most frequently articu-

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[2] The citation to these intervening legal developments could be relevant only to a claim that respondents' prayers for equitable relief are moot. Respondents, however, noticeably have stopped short of suggesting that their prayers are moot, realizing that in such circumstances this Court would have to vacate the judgment of the court below and remand with instructions to dismiss. See *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950).

[3] Respondents likewise err in suggesting (Br. in Opp. 18) that the question whether basic principles of equity jurisprudence bar the issuance of injunctive or declaratory relief in the circumstances of this case was not raised in the court below. That question was the principal focus of Judge Wallace's dissent. See Pet. App. 29a-31a; see also *id.* at 54a-58a, 62a-64a.

lated in cases dealing with the authority of federal courts to intervene in pending state criminal cases,[4] it has also been applied to cases dealing with the authority of the federal courts to enjoin or declare unconstitutional state law enforcement practices (where no proceedings are pending). See *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 112 (1983); *Rizzo* v. *Goode*, 423 U.S. 362, 379 (1976).[5] As the holdings

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[4] We note that in *Deakins* v. *Monoghan*, cert. granted, No. 86-890 (Jan. 27, 1987), the Court will decide whether a federal court must abstain from addressing federal constitutional claims where a state grand jury investigation is pending. This petition need not be held pending the Court's resolution of *Deakins*. This case does not involve abstention principles or state grand jury proceedings. Rather, it concerns whether a federal court may enjoin or declare unconstitutional a federal prosecutor's criminal investigation in the absence of extraordinary circumstances. Thus, while somewhat analogous law enforcement concerns are at stake in the two cases, the Court's decision in *Deakins* will not affect the resolution of the questions raised here.

[5] In suggesting (Br. in Opp. 19-21) that the basic equity principles underlying this Court's decision in *Younger* v. *Harris*, 401 U.S. 37 (1971), do not apply where a state criminal proceeding is not pending, respondents confuse the circumstances in which federal courts must "abstain" from deciding federal questions with the circumstances in which equity principles bar federal courts from issuing equitable relief. Absent "extraordinary circumstances," a federal court must "abstain" from adjudicating *any* federal question where state proceedings that will culminate in judicial review of those claims are pending. See *Ohio Civil Rights Comm'n* v. *Dayton Christian Schools, Inc.*, No. 85-488 (June 27, 1986). In the absence of such pending proceedings, the federal court may adjudicate claims for monetary relief regardless of the circumstances (unless an immunity exists). Even where no state proceedings are pending, however, the federal court may not issue injunctive or declaratory relief in the absence of

of the lower federal courts illustrate (see, *e.g.*, *Reporters Comm. for Freedom of the Press* v. *American Telephone & Telegraph Co.*, 593 F.2d 1030, 1065 (D.C. Cir. 1978), cert. denied, 440 U.S. 949 (1979); *Jett* v. *Castaneda*, 578 F.2d 842, 845 (9th Cir. 1978); *LaRouche* v. *Webster*, 566 F. Supp. 415, 417 (S.D.N.Y. 1983)), no lesser restriction on judicial power can apply where federal criminal investigative activities are concerned. See *Allen* v. *Wright*, 468 U.S. at 760.

As we noted in our petition (at 24-27), no "extraordinary circumstances" can be found on the *undisputed facts* in this case. As the court of appeals itself found, petitioners clearly had a legitimate investigative purpose in this case, to wit, "preventing voter registration fraud" (Pet. App. 19a); there is no "evidence that * * * the Government intended to deny or abridge [respondents'] right to vote" (*id.* at 21a); and "the government officials did not violate [any] 'clearly established' rights" by their conduct of the investigation (*id.* at 24a). Accordingly, there is no basis for subjecting petitioners to additional proceedings in the district court.

For the foregoing reasons and the additional reasons stated in the petition for a writ of certiorari, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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Solicitor General

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"extraordinary circumstances." See *City of Los Angeles* v. *Lyons*, 461 U.S. at 112; *Rizzo* v. *Goode*, 423 U.S. at 379. That is the situation here.

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